No. 97-581

Supreme Court, U.S.
FILED
FEB 2 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Petitioner,

—v.—

KEITH M. SCOTT,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

Tracey Maclin
(Counsel of Record)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Stefan Presser
ACLU of Pennsylvania Foundation
125 South Ninth Street
Philadelphia, Pennsylvania 19107
(215) 592-1513

Of Counsel:

Lisa B. Kemler
108 North Alfred Street
Post Office Box 20900
Alexandria, Virginia 22313
(703) 684-8000

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE SEARCH OF RESPONDENT'S HOME WAS NOT A VALID CONSENT SEARCH 6

II. A SUSPICIONLESS SEARCH OF A PAROLEE'S HOME VIOLATES THE REASONING OF *GRIFFIN* 13

III. APPLYING THE EXCLUSIONARY RULE ENCOURAGES PAROLE OFFICERS TO RESPECT FOURTH AMENDMENT NORMS 19

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Brown v. Illinois,
422 U.S. 590 (1975) 21

Camara v. Municipal Court,
387 U.S. 523 (1967) 16

Commonwealth v. Williams,
692 A.2d 1031 (Pa. 1997) 3

Donovan v. Dewey,
452 U.S. 594 (1981) 11, 12

Griffin v. Wisconsin,
483 U.S. 86 (1987) . . . . . *passim*

Illinois v. Rodriguez,
497 U.S. 177 (1990) 8

INS v. Lopez-Mendoza,
468 U.S. 1032 (1984) 22

James v. Illinois,
493 U.S. 307 (1990) 21

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 10, 11

Maryland v. Buie,
494 U.S. 325 (1990) 17

Morrissey v. Brewer,
408 U.S. 471 (1972) 12

Murray v. United States,
487 U.S. 533 (1988) 22

Page

New York v. Burger,
482 U.S. 691 (1987) 11, 12

Ohio v. Robinette,
519 U.S. __, 117 S.Ct. 417 (1996) 12, 18

One Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965) 21

Richards v. Wisconsin,
520 U.S. __, 117 S.Ct. 1416 (1997) 17

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 7, 9, 12

Stone v. Powell,
428 U.S. 465 (1976) 21

United States v. Biswell,
406 U.S. 311 (1972) 8, 10

United States v. Calandra,
414 U.S. 338 (1974) 19, 21

United States v. Janis,
428 U.S. 433 (1976) 21

United States v. White,
401 U.S. 745 (1971) 13

United States v. Winsett,
518 F.2d 51 (9th Cir. 1975) 4

Zap v. United States,
328 U.S. 624 (1946) 9

Statutes and Regulations

Wis. Admin. Code
HSS §328.04(3)(k)(1981) 15

Other Authorities

4 LaFave, Wayne F., SEARCH AND SEIZURE (3d ed. 1996) 10, 11, 14, 18, 23

56 Fed. Reg. 30870 (July 8, 1991) 24

Cohen & Gobert, THE LAW OF PROBATION AND PAROLE (1983) 8, 25

del Carmen, Rolando V., "Potential Liabilities of Probation and Parole Officers" (National Institute of Corrections, Aug. 1985) 24

Kutcher, Judd D., "Looking at the Law," 46 Federal Probation 55 (Sept. 1982) 24

Loewenthal, Milton A., "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L.Rev. 24 (1980) 20

Matthew Purdy, "Visits and Vigilance: Sex Offenders Shadowed by Parole Officers," N.Y. Times, June 8, 1997 25

Opalisky, Mark E., "The Applicability of the Exclusionary Rule to Probation Revocation Proceedings," 17 Mem. St. U. L.Rev. 555 (1987) 23

Parole Commission, Department of Justice, "Paroling, Recommitting and Supervising Federal Prisoners: Searches of Federal Parolees by U.S. Probation Officers," 28 C.F.R. Part 2 24

Petersilia, Joan, "Probation and Felony Offenders," 49 Fed. Probation 4 (June 1985) 25

Steve Elliott, "Probation Officer Turns Up HEAT," Fresno Bee, Nov. 27, 1997 25

White, Welsh S., "The Fourth Amendment Rights of Parolees and Probationers," 31 U.Pitt.L.Rev. 167 (1969) 18

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Pennsylvania is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many Fourth Amendment cases. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. Composed of more than 9,000 attorneys and 28,000 affiliate members in 50 states, NACDL is recognized by the American Bar Association as an affiliate organization. It also has full representation in the ABA's House of Delegates. NACDL strives to defend the liberties guaranteed by the Bill of Rights.

STATEMENT OF THE CASE

On April 2, 1982, respondent Keith M. Scott was sentenced to a ten to twenty year term of imprisonment on his

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

plea of *nolo contendere* to third degree murder. On September 1, 1993, respondent was paroled subject to several conditions. One condition stated:

> I expressly consent to the search of my person, property and residence, without a warrant by agents of the Pennsylvania Board of Probation and Parole. Any item, in [sic] the possession of which constitutes a violation of parole/ reparole shall be subject to seizure, and may be used as evidence in the parole revocation process.

J.A. 7a.

On February 4, 1994, parole agents acting pursuant to a warrant issued by petitioner, the Pennsylvania Board of Probation and Parole, arrested respondent in a diner for various parole violations. While respondent was taken to jail, Agent Mundro drove to respondent's home with Dorothy Hahn, a friend of respondent who had been with him in the diner. Although respondent was living at the time with his mother and stepfather, no one was home when the agents arrived. Mundro instructed Hahn to open the door with respondent's keys, which she did. Hahn then called respondent's mother, Dorothy McDaniel.

When Mrs. McDaniel arrived home, Mundro informed her that he was going to search respondent's bedroom and asked her to identify which room was his. (He also told her that the agents would find it on their own if she did not cooperate.) After looking through the bedroom, Mundro searched an adjacent room without asking Mrs. McDaniel's consent and found five unloaded firearms under a sofa. In addition, he found a compound bow and three arrows in a closet. Mrs. McDaniel informed the agents that all the weapons belonged to her husband. J.A. 80-82a; J.A. 85-89a. They were nonetheless seized.

Respondent moved to suppress the weapons at his parole revocation hearing. In opposition to that motion, Agent Mundro testified that he did not need the permission of a homeowner to search a parolee's approved residence. Mundro further explained that he searched respondent's house because Agent Gallo, respondent's parole agent and the official representing petitioner at the revocation hearing, had suggested that guns might be there. J.A. 83a, 92a. The hearing officer admitted the evidence. J.A. 84-85a.

That ruling was reversed by the Commonwealth Court of Pennsylvania, which held that the search violated the Fourth Amendment because it "was conducted without the owner's consent and without a statutory or regulatory framework authorizing such a search." Pet.App. 31a. The court specifically found that the consent condition contained in respondent's parole agreement did not justify the search. Finally, the court concluded that the exclusionary rule was applicable to respondent's revocation hearing. Pet.App. 30a, n.3, 37a.

The Pennsylvania Supreme Court affirmed. It began its opinion by noting that parolees are protected against unreasonable searches of their homes. It then ruled, as a matter of state law, that respondent's right against "unreasonable searches and seizures [was] unaffected by his signing of the consent to search provision." Pet.App. 10a. The court reached this conclusion by citing an earlier state law ruling in *Commonwealth v. Williams*, 692 A.2d 1031, 1036 (Pa. 1997), for the proposition that the parole release form was limited in scope and merely acknowledged "'that the parole officer has a right to conduct reasonable searches of [the] residence listed on the parole agreement without a warrant.'" Pet.App. 9-10a. Finally, the court held that the search in this case violated the Fourth Amendment because it lacked reasonable suspicion. Pet.App. 10a.

Based on that finding, the Pennsylvania Supreme Court agreed that the exclusionary rule applied on the facts of this case. In a carefully crafted opinion, the court held that the deterrent purpose of the exclusionary rule requires the suppression of illegally obtained evidence at a revocation hearing when the agent conducting the search is aware in advance of the suspect's parole status. Otherwise, the court recognized, the agent "'ha[s] nothing to risk: If the motion to suppress in the criminal proceedings [is] denied, defendant would stand convicted of a new crime; and if the motion [is] granted, the defendant would still find himself behind bars due to revocation of [parole].'" Pet.App. 13a, quoting *United States v. Winsett*, 518 F.2d 51, 54, n.5 (9th Cir. 1975). Thus, in these limited circumstances at least, "there is a need to apply the exclusionary rule to the revocation process since there is nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence." Pet.App. 15a.

This Court granted the petition for a writ of *certiorari* to decide whether the exclusionary rule was appropriately applied in this case. The Court also invited the parties to brief the following issue: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?" 118 S.Ct. 554 (1997).[2]

[2] *Amici* agree with respondent that the second question may not be fairly presented by this record since the Pennsylvania Supreme Court has held as a matter of state law that the parole release form signed by respondent did not constitute "consent" to searches that are unsupported by reasonable suspicion.

SUMMARY OF ARGUMENT

The search of respondent's home was not a valid consent search. Petitioner insists that a suspicionless search was legal because respondent signed a mandatory parole condition form that waived his Fourth Amendment rights. Consent searches are not controlled by a waiver-of-rights theory; instead, a consent search is judged by a voluntariness test that considers the totality of the circumstances surrounding the search.

This Court's administrative search cases provide a helpful framework for analyzing the search of respondent's home. Recent administrative search cases have abandoned theories of implied consent, and judge the reasonableness of such searches on a case-by-case basis. In concluding that the search of a parolee's home must be based on reasonable suspicion even where a parolee has signed a consent form, the court below followed this Court's precedents and considered the totality of the circumstances when determining the reasonableness of that search.

The suspicionless search of respondent's home also conflicts with the reasoning of *Griffin v. Wisconsin*, 483 U.S. 86 (1987). Although Wisconsin had a regulation that "ma[de] it a violation of the terms of probation to refuse to consent to a home search," *id.* at 871, *Griffin* accorded no constitutional weight to this consent rule in judging the reasonableness of the search of a probationer's home. Instead, *Griffin* emphasized the existence of a regulatory framework that provided guidance and standards for probation officers to determine when "reasonable grounds" existed for a particular search. Unlike the search in *Griffin*, no administrative rules controlled the search of respondent's home.

Because parolees do not forfeit all Fourth Amendment rights, the court below properly assessed the deterrent value of the exclusionary rule in cases of this sort. As the Penn-

sylvania Supreme Court recognized, a parolee who violates the conditions of his parole can, and usually is, returned to jail without the necessity of a formal criminal trial. Thus, the fact that illegally seized evidence cannot be used at a criminal trial is unlikely to deter an agent who is accumulating evidence for a parole revocation hearing. Conversely, the core values of the Fourth Amendment can only be enforced if the exclusionary rule is applied to parole revocation hearings under these circumstances. That is all the lower court held in this case and all, *amici* respectfully submit, that this Court should address.

ARGUMENT

I. THE SEARCH OF RESPONDENT'S HOME WAS NOT A VALID CONSENT SEARCH

Petitioner contends that the suspicionless search of respondent's home does not violate the Fourth Amendment because respondent consented to this search as a condition of parole. Brief for Petitioner at 20 (respondent "expressly consented to warrantless searches by parole agents"). Implying that parole is an "act of grace" offered by the state, petitioner argues that there is "no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison." *Id.* Once respondent signed the consent form contained in his parole agreement, petitioner argues, he also accepted the state's authority to invade his privacy whenever agents decided such action would advance the penological goals of parole. *Id.* at 23-24.

The United States, as *amicus curiae,* adopts a similar approach to the suspicionless search of respondent's home. According to the Solicitor General, respondent waived his Fourth Amendment rights by accepting parole with the condition that he consent to warrantless searches. Persons may

"enter into arrangements with the government under which the individual relinquishes constitutional rights for a promise of favorable treatment." Brief for the United States at 22. Provided the individual is "accurately apprised of the options available to him," these agreements are constitutionally valid even when the person "is forced to choose between unattractive alternatives." *Id.* at 23. In this case, the United States contends, the parole agreement represented a valid waiver of respondent's Fourth Amendment rights, and thus furnished respondent's "consent" to the search of his home by Agent Mundro.

Both petitioner and its *amici* miss the point of this Court's consent doctrine under the Fourth Amendment. First, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), established that consent searches are not controlled by a waiver-of-rights theory but are judged by a voluntariness test that considers the totality of the circumstances surrounding the search.[3] Thus, petitioner's consent theory reflects an antiquated vision of the Fourth Amendment.

Second, judged by a totality-of-the-circumstances test that does not rely on some fictional waiver, petitioner's claim that respondent's "consent" authorized the search of his home ignores the facts of this case. As far as the record reveals, respondent never gave his consent. Nor did Mrs.

---

[3] *See* 412 U.S. at 246 ("[T]here is nothing in the purposes or application of the waiver requirements of *Johnson v. Zerbst* [304 U.S. 458 (1938)] that justifies, much less compels, the easy equation of a knowing waiver with a consent search"). Curiously, although petitioner emphasizes the consent condition that respondent signed, and argues that respondent "expressly consented to warrantless searches by parole agents," Brief for Petitioner at 20, petitioner fails to cite *Schneckloth.* The Solicitor General's only reference to *Schneckloth* is a conclusory quote that "'a search conducted pursuant to a valid consent is constitutionally permissible.'" Brief for the United States at 22, quoting *Schneckloth,* 412 U.S. at 222.

McDaniel, who shared the house with respondent. *Cf. Illinois v. Rodriguez*, 497 U.S. 177, 180 (1990)(third-party with common authority over the premises can consent to the search of a home). Mrs. McDaniel acquiesced to the search of respondent's bedroom only after Agent Mundro told her that he would search the house regardless of her consent. J.A. 80-83a. Her consent was neither sought nor given before agents searched the adjoining room where the weapons were ultimately found.

In an analogous context, this Court has recognized that a gun dealer who provides access to his books and inventory only after a law enforcement officer asserts his authority to conduct a warrantless search has not "consented" for Fourth Amendment purposes. *United States v. Biswell*, 406 U.S. 311, 315 (1972). Where an officer claims authority to search, as Agent Mundro did in this case, "the legality of the search depends not on consent but on the authority of a valid statute" or other administrative framework that serves to limit the discretion of the officer. *Id.* Here, no such framework exists. To the contrary, Agent Mundro openly admitted at the parole revocation hearing that he felt his authority to search was unlimited. *See* p.3, *supra*. Such a broad claim of authority is fundamentally inconsistent with the Fourth Amendment. It cannot be sustained in this case on the basis of consent for the simple reason that neither respondent nor his mother consented to this search.[4]

---

[4] Although characterized as a form of "consent," the conditional parole release form signed by respondent functions, in reality, as a mandatory rule applicable to all parolees. As petitioner concedes, respondent would not have been granted parole without signing the form. *See* Brief for Petitioner at 20 ("There is, of course, no requirement that a parolee accept the parole conditions; he is free to reject the conditions and serve out his sentence in prison."); Cohen & Gobert, THE LAW OF PROBATION AND PAROLE §5.07 at 205 (1983)("Any right to refuse probation or pa- (continued...)

The Court's administrative search cases further undermine petitioner's consent rationale and demonstrate the degree to which Fourth Amendment jurisprudence has shifted in favor of a totality-of-the-circumstances test.[5] Prior to *Schneckloth*, the Court permitted the granting of licenses, contracts or other privileges conditioned on the waiver of Fourth Amendment rights by parties doing business with the government. For example, in *Zap v. United States*, 328 U.S. 624, 628 (1946), the Court noted that when a federal contractor, "in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.*[6]

Relying on similar reasoning, petitioner asserts that respondent retains no Fourth Amendment interest in his home

---

[4] (...continued)
role, moreover, is limited. The offender can only accept or reject the entire package of conditions; there is no right to accept some conditions but not others"). In the language of the Fourth Amendment, therefore, the parole release form does not represent a free and voluntary choice to consent to all searches; rather, it is a rule all parolees must obey. It thus closely resembles the administrative rule that Wisconsin unsuccessfully relied on to justify warrantless searches in *Griffin v. Wisconsin*, 483 U.S. at 871. *See* pp.14-15, *infra*.

[5] *Amici* do not mean to equate the law enforcement search of respondent's home with the regulatory search of a licensed business. This Court has frequently recognized that privacy interests are most acute in the home. But, for that very reason, the rejection of the waiver theory in the administrative search cases has even added force here.

[6] Even while recognizing the government's power to extract waivers of Fourth Amendment rights from government contractors, *Zap* cautioned that this power was not without limits: "*Whatever may be the limits of that power of inspection*, they were not transcended here." 328 U.S. at 628 (emphasis added).

because he signed a consent form authorizing searches as a condition of his parole. But, this view of the Fourth Amendment has been repudiated even when dealing with the administrative search of a business establishment. Contrary to petitioner's outdated view, the modern Court's administrative search cases forsake theories of implied consent and assess the reasonableness of administrative searches on a case-by-case basis. *See* 4 Wayne F. LaFave, SEARCH AND SEIZURE §10.2(c), at 412 (3d ed. 1996).

Biswell is particularly instructive. Although the Court ultimately upheld the warrantless search of a gun dealership, it did not rely on the fiction that gun dealers "consent" to any and all administrative inspections required by federal law. Instead, the Court employed a balancing process, which carefully evaluated the totality of the circumstances. As the Court noted, the warrantless search in *Biswell* was authorized by a narrowly drawn statute that posed only "limited threats to the dealer's justifiable expectations of privacy." 406 U.S. at 316. Specifically, the law provided notice to gun dealers that inspections would be confined in time, place and scope; it also informed gun dealers of the inspector's purposes and the limits of his authority to search. *Id.* at 316-17.[7]

---

[7] *See also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 338 (1978)(Stevens J., dissenting)(emphasis added):

> In fact, . . . consent is fictional in both [*Biswell* and in inspections of businesses regulated under the Occupational Safety and Health Act] . . . . In both situations, *the validity of the regulations depends not upon the consent of those regulated,* but on the existence of a federal statute embodying a congressional determination that the public interest in the health of the Nation's work force or the limitation of illegal firearms traffic outweighs the businessman's interest in preventing a Government inspector from viewing those areas of his premises which relate to the subject matter of the regulation.

Similarly, in *Donovan v. Dewey*, 452 U.S. 594 (1981), the Court did not rely on a theory of implied consent to uphold the search of underground and surface mines. Though warrantless searches were involved, *Dewey* explained that the federal inspection framework, "in terms of the certainty and regularity of its application, provide[d] a constitutionally adequate substitute for a warrant." *Id.* at 603. As in *Biswell*, *Dewey* employed a balancing analysis that weighed several factors. In particular, the challenged search was authorized by a law that: (1) required the inspection of all mines; (2) defined the frequency of inspections; (3) notified mine operators of the purposes of inspection and the limits of an inspector's task; and (4) mandated a process for "accommodating any special privacy concerns that a specific mine operator might have." *Id.* at 603-04.[8]

Finally, *New York v. Burger*, 482 U.S. 691 (1987), upheld an administrative search aimed at businesses dealing in used automobile parts. *Burger*'s analysis of the challenged warrantless search extended beyond the conclusion that junkyard dealers possess a reduced expectation of privacy in their premises due to the pervasiveness and duration of governmental regulation of the industry. *Id.* at 700. A warrantless search was reasonable provided three criteria were met. Those criteria included: a substantial interest justifying the search; a showing that searches are necessary to promote that interest; and a statutory framework that serves as a proxy for a warrant. *Id.* at 702. This last factor meant that

---

[8] *See also id.* at 611 (Stewart, J., dissenting)(objecting that *Dewey* repudiates the implied consent rationale that had been stated in *dicta* in *Barlow's*); LaFave, *supra*, §10.2(c) at 414-15 ("The Court in *Dewey* dealt with the property owner's awareness of the inspection scheme as a matter bearing upon the reasonableness of that scheme, rather than as showing the owner had impliedly consented, and upheld the regulatory scheme without regard to whether it had predated the owner's entry into the regulated business")(footnote omitted).

the search process "must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* at 703.

Respondent's reduced expectation of privacy in his home does not permit the state to concoct fictional notions of consent to eliminate the remainder of his Fourth Amendment rights. Nor does it eviscerate the balancing analysis of the *Biswell-Dewey-Burger* line of cases. To be sure, parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [parole] restrictions.'" *Griffin*, 483 U.S. at 874, quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). But the gun dealers in *Biswell* and the mine operators in *Dewey* also possessed diminished privacy rights in the records, inventory and facilities that were subject to frequent regulatory search. *See Biswell*, 406 U.S. at 315-16; *Dewey*, 452 U.S. at 601-06.

In sum, whether a search of a parolee's home must be based on reasonable suspicion to be valid under the Fourth Amendment "cannot be resolved by any infallible touchstone," *Schneckloth*, 412 U.S. at 229, including the fact that respondent in this case signed a consent form as a condition of parole. "Rather, it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches." *Id.* at 233.[9] What petitioner advocates instead, and what this Court has properly rejected is "the substitution of words for analysis." *United States v. White*, 401 U.S. 745, 785 (1971)(Harlan, J., dissenting).

[9] *See also Ohio v. Robinette*, 519 U.S. __, __, 117 S.Ct. 417, 421 (1996) (emphasizing that because reasonableness "is measured in objective terms by examining the totality of the circumstances," the Court rejects a *per se* rule for determining the validity of a consent to search).

The court below correctly followed the precedents of this Court and considered the totality of the circumstances in determining the reasonableness of the search. Its decision did not turn on an unsound and unrealistic view of consent. To the contrary, the Pennsylvania Supreme Court explained that where a search of a parolee's home is the product of coercive government power and not genuine consent, reasonable suspicion must exist to justify the search.

If adopted, petitioner's view of consent would effectively grant parole officers unchecked discretion to invade the privacy and security of parolees and their families, without even a requirement of reasonable suspicion. Of course, that result would conflict with another precedent of this Court, *Griffin v. Wisconsin*, 483 U.S. 868, which confirmed that one's status as a probationer or parolee does not compel the elimination of all Fourth Amendment protection for such persons.

II. A SUSPICIONLESS SEARCH OF A PAROLEE'S HOME VIOLATES THE REASONING OF *GRIFFIN*

By permitting the warrantless search of a probationer's home on less than probable cause, *Griffin* held that parolees and probationers do not enjoy the same degree of Fourth Amendment privacy as the rest of society. But, by insisting that even the search of a probationer's home must be constitutionally reasonable, the *Griffin* Court recognized that parolees and probationers do not shed all their Fourth Amendment rights.

Thus, the holding of *Griffin* represents a middle ground. On the one hand, the Court acknowledged that su-

pervision of a parolee "is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." 483 U.S. at 874-75. On the other hand, the Court stopped well short of holding that those privacy rights disappear entirely.

Prior to *Griffin*, courts relied on one of three theories to explain why probationers and parolees lack full Fourth Amendment protection: a "constructive custody" theory, which reasoned that parolees had the same rights as prisoners; an "act of grace" theory which allowed the state to attach restrictions on a parolee's privacy; or, a "consent" theory, in cases where parole was conditioned upon the waiver of Fourth Amendment rights. *See* LaFave, *supra*, §10.10 at 758.

Notably, *Griffin* declined to rely on any of these theories in concluding that probationers possess only a limited privacy interest, and that neither the warrant nor probable cause requirements apply to the search of a probationer's home.[10] Indeed, Wisconsin's regulatory framework governing probationers and parolees "ma[de] it a violation of the terms of probation to refuse to consent to a home

[10] *See* LaFave, *supra*, §10.10(a) at 761 ("In upholding the search of a probationer's home without compliance with the usual Fourth Amendment requirements of full probable cause and a search warrant, [*Griffin*] made no mention of the constructive custody theory as a justification") (footnote omitted); *id.* §10.10(b) at 762 ("in the course of recognizing that less demanding Fourth Amendment standards govern as to a probation officer's supervisory search, [*Griffin*] relied not at all upon the 'act of grace' theory"); *id.* at 766 ("it would seem doubtful that any waiver of Fourth Amendment rights obtained as the quid pro quo of a grant of probation or parole could pass muster under *Schneckloth*. Doubtless this explains why [*Griffin*] . . . relied not at all upon the waiver theory").

search."[11] Notwithstanding this mandatory rule, which is the functional equivalent of the consent condition signed by respondent in this case, *Griffin* eschewed any reliance on notions of consent in determining the reasonableness of the search of Griffin's home.

Instead of relying on a mandatory consent rule or upon theories of "constructive custody" or implied consent, all of which minimize in one way or another the serious constitutional implications associated with a warrantless search of a home, *Griffin* balanced the competing interests to reach a conclusion on the overall reasonableness of the search. Essential to that balancing process was the existence of a regulatory framework that provided guidance and standards for probation officers to determine when "reasonable grounds" existed for a particular search. *See Griffin*, 483 U.S. at 873 ("The search of Griffin's home satisfied the demands of the Fourth Amendment because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement under well-established principles").

Griffin grants parole agents a substantial degree of discretion to monitor the activities of parolees. Nonetheless, *Griffin* did not eliminate Fourth Amendment protection for parolees,[12] nor did it suggest that agents have boundless au-

[11] *Griffin*, 483 U.S. at 871. The relevant provision stated: "When probation or parole begins, an agent shall meet with a client to review or develop written rules and specific conditions of the client's supervision, or both. These rules require that the client shall . . . [m]ake himself or herself available for searches ordered by the agent, including but not limited to body contents searches as defined in DOC §328.21(4)(a), or search of the client's residence or any property under the client's control." Wis. Admin. Code HSS §328.04(3)(k)(1981).

[12] "A [parolee's] home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 483 U.S. at 873.

thority to conduct suspicionless searches of a parolee's home, as urged by petitioner. To the contrary, *Griffin* cautioned that the "permissible degree [of state intrusion into parolee's privacy] is not unlimited." *Id.* at 875. Petitioner's reading of *Griffin* as allowing a suspicionless search of a parolee's home provided the intrusion relates to the legitimate penological objectives of parole, Brief for Petitioner at 24-25, ignores *Griffin*'s actual holding.

What *Griffin* actually held was that the home search in that case "was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers." 483 U.S. at 880. The regulation referenced by the Court instructed probation officers to "consider a variety of factors in determining whether 'reasonable grounds' exist for a particular search." *Id.* at 871. Thus, *Griffin* placed a deliberate emphasis on the existence of a regulatory scheme. This emphasis was consistent, moreover, with the Court's earlier holdings permitting regulatory searches without warrants or probable cause provided such searches "meet 'reasonable legislative or administrative standards.'" *Id.* at 873, quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

As in the administrative search cases discussed above, the regulatory scheme in *Griffin* provided a measure of control and guidance for probation officers deciding when to intrude upon a probationer's privacy. That regulatory program did not leave officers with unchecked discretion to search. Rather, searches were permitted only when "reasonable grounds" existed for a search. Wisconsin did not suggest and the Court did not hold that the state's legitimate needs for supervision required suspicionless searches. *See Griffin v. Wisconsin*, No. 86-5324, Transcript of Oral Arg. at 48 (statement of counsel for Wisconsin: "Justice Scalia, my argument is that the federal Constitution permits searches of a probationer's residence by a probation officer

on less than probable cause, on what we would call reasonable grounds or reasonable suspicion").

Unlike the search in *Griffin*, no regulatory or administrative framework controlled the search of respondent's home.[13] When state agents are permitted to invade a parolee's home without reasonable suspicion of a parole violation, and without statutory or administrative guidance, they are effectively granted authority to conduct an unreasonable search. Such a search violates the rule and spirit of *Griffin*. Rather than endorse that outcome, the court below required reasonable suspicion of a parole violation before proceeding with a search of a parolee's home. As in *Griffin*, this approach balances the privacy rights of the parolee and his family with the state's legitimate interests in rehabilitation and community safety.[14]

Petitioner's contention that the consent agreement extracted from every parolee as a condition of parole permits

---

[13] Pet.App. 5-6a. In 1995, subsequent to the search of respondent's home, the Pennsylvania General Assembly enacted a legislative framework for searches by parole agents. That framework includes a provision, which states: "'[a] property search may be conducted by any [parole] agent if there is reasonable suspicion to believe that the real or other property in the possession of or under the control of the offender contains contraband or other evidence of violations of the conditions of supervision.'" *Id.* at 16a, n.11.

[14] *See Maryland v. Buie*, 494 U.S. 325 (1990)(rejecting the state's claim that protective sweep of a home is valid without reasonable suspicion when the area may contain someone who is a threat to the police; a protective sweep of a home is permissible only where there is reasonable suspicion that the area to be swept harbors an individual posing a danger to those on the arrest scene); *see also Richards v. Wisconsin*, 520 U.S. __, __, 117 S.Ct. 1416, 1421-22 (1997)(rejecting a blanket rule permitting police to effectuate an unannounced entry of a home whenever they possess a search warrant for narcotics).

suspicionless searches ignores the central purpose of the balancing test endorsed in *Griffin*:

> [U]nder the *Camara* balancing approach[,] no greater intrusions should be made than "are necessary to effect a proper rehabilitation [and to ensure the public's safety]." This is quite different from the simplistic notions that the probationer or parolee is equivalent to a prisoner in terms of his Fourth Amendment rights or that he can lose those rights by virtue of being the recipient of an "act of grace" or by signing them away in order to gain his freedom, for these notions can readily lead to a degree of surveillance which hinders efforts at rehabilitation. This distinction is highlighted in *Griffin v. Wisconsin* . . . .[15]

Thus, the Fourth Amendment's ultimate command of reasonableness must govern the evaluation of the consent form and any searches that it purports to authorize.[16] It necessarily follows from this premise that a mandatory consent rule that effectively grants parole agents a commission to search and seize at will does not satisfy the Fourth Amendment's reasonableness requirement.

[15] LaFave, *supra*, §10.10(c)(footnote omitted), discussing Welsh S. White, "The Fourth Amendment Rights of Parolees and Probationers," 31 U.Pitt.L.Rev. 167 (1969).

[16] *See Robinette*, 117 S.Ct. at 421 (in assessing whether a motorist gave consent to search his car during a traffic stop, the Court "ha[s] long held that the touchstone of the Fourth Amendment is reasonableness").

III. APPLYING THE EXCLUSIONARY RULE ENCOURAGES PAROLE OFFICERS TO RESPECT FOURTH AMENDMENT NORMS

Recognizing that parolees are not stripped of all Fourth Amendment rights, the Pennsylvania Supreme Court required reasonable suspicion to search a parolee's home. That court then conducted a second balancing analysis to determine whether the exclusionary rule should apply when agents violate the Constitution. In finding the rule applicable, the Pennsylvania high court issued a very narrow ruling. It held that if a parole agent is aware of a suspect's parole status and engages in an illegal search, the exclusionary rule applies at a subsequent parole revocation hearing.[17]

This holding is entirely consistent with what this Court has often expressed as the deterrent purpose of the exclusionary rule. *See United States v. Calandra*, 414 U.S. 338, 347 (1974)(the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures").

Conversely, if the exclusionary rule did not apply in the circumstances of this case,

> there [would be] nothing to deter a parole agent from conducting an illegal search or engaging in other illegal activity to obtain evidence. The parole agent could establish a parole violation by means of illegally obtained

[17] The correctness of this holding is the only exclusionary rule issue before this Court. Accordingly, this Court need not and should not decide whether the exclusionary rule also applies in parole revocation hearings when the evidence is seized by a police officer that is purportedly unaware of the parolee's status. Resolution of that important Fourth Amendment question should await a proper record.

> evidence in a proceeding which places a minimal burden of proof upon the Commonwealth, and the same result would be achieved as if the parolee was criminally tried -- the parolee would be incarcerated.

Pet.App. 15-16a.

Petitioner does not directly quarrel with this reasoning. Instead, petitioner contends that, as a result of the decision below, the exclusionary rule will apply in most revocation hearings since parole agents "always know" the suspect they are investigating is a parolee; "otherwise, the agents would not be interested in his activities or what he may have in his residence." Brief for Petitioner at 32. But that factual observation, even if true, hardly diminishes the force of the legal conclusion that the exclusionary rule is a necessary prophylaxis to ensure that parole officers comply with the Fourth Amendment.

Petitioner's assertion that parole revocation hearings are not criminal trials, *id.* at 29-33, is similarly beside the point. It is precisely because parole revocation hearings provide an alternative route to reincarceration for most parolees that the exclusionary rule *must* apply in these circumstances. Otherwise, there is very little incentive for a parole officer to comply with the Fourth Amendment when searching a parolee's home, and *Griffin*'s conclusion that the Fourth Amendment protects probationers and parolees will be rendered largely meaningless.[18] That result promotes neither privacy nor rehabilitation.

"In evaluating the need for a deterrent sanction, one

[18] *Cf.* Milton A. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L.Rev. 24, 29 (1980)(finding that police officers are less likely to comply with the Fourth Amendment if they feel that evidence will be admitted anyway).

must first identify those who are to be deterred." *United States v. Janis*, 428 U.S. 433, 448 (1976). Here, the rule adopted below focuses directly on agents investigating known parolees. Such agents have an obvious interest in acquiring incriminating evidence and the capacity to avoid the customary constraints of the criminal justice process, including most especially the exclusionary rule that would normally apply in a criminal trial. By extending the exclusionary rule to parole revocation hearings under these circumstances, the deterrent impact of the ruling below is precisely focused upon "the offending officer's zone of primary interest." *Id.* at 458.

Petitioner also argues that the exclusionary rule should not apply to parole revocation hearings because the Court has not extended it to collateral contexts. Brief for Petitioner at 27-28. To be sure, this Court has been reluctant to extend the exclusionary rule to proceedings other than the criminal trial itself. *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976); *Calandra*, 414 U.S. at 347; *Janis*, 428 U.S. at 448; *but cf. One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965)(exclusionary rule applies to forfeiture proceeding because the "object" of the proceeding, "like a criminal trial, is to penalize for the commission of an offense against the law"). At the same time, the Court has cautioned against *per se* rules for determining when the exclusionary rule should apply.[19]

Application of a *per se* rule would be particularly inappropriate here since the revocation hearing is plainly not a "collateral" proceeding for the parole agents involved. In

[19] *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603 (1975). *See also James v. Illinois*, 493 U.S. 307, 322 (1990)(Kennedy, J., dissenting)("[i]mplementation of the rule requires [the Court] to draw certain lines to effect its purpose of deterring unlawful conduct").

fact, the opposite is true. The offending agent's

> primary objective, in practice, will be to use evidence in the [revocation] proceeding. Moreover, here, in contrast to *Janis*, the [parole agents] who effect the unlawful [search] are the same officials who subsequently bring the [revocation] action.

INS v. Lopez-Mendoza, 468 U.S. 1032, 1043 (1984).[20]

The rule established below does not require an inquiry into the subjective intent of parole officers. The question of whether a parole officer knows he is searching the home of a parolee is an objective one. As the court below observed: "Applying the [exclusionary] rule to the instant case, we find that it is clear that Agents Mundro and Gallo knew [respondent] was a parolee. This is established by the fact that immediately prior to the search, the agents arrested [respondent] for parole violations." Pet.App. 17a.

This reliance on objectively verifiable facts echoes the approach taken under the "independent source" rule. As Justice Scalia explained the rule in *Murray v. United States*, 487 U.S. 533, 541 (1988): "The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by

[20] *INS v. Lopez-Mendoza* ruled that the exclusionary rule is inapplicable in a civil deportation hearing. The majority relied upon several factors unique to the context of illegal immigration and deportation. 468 U.S. at 1043-45. Of special relevance to the concern of deterrence was the fact that "the INS has its own comprehensive scheme for deterring Fourth Amendment violations" by training and discipline. *Id.* at 1044. The record in this case reveals no similar program by petitioner to deter Fourth Amendment violations by parole agents.

what they had seen during the initial [illegal] entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant."

Likewise, in this case,

> "[i]f the search is made by a person who is particularly responsible for the individual on conditional release, such as his probation officer or parole officer, then it is clear that there is a need to deter, for such persons will be primarily interested in the question of whether the individuals under their supervision will have their conditional release revoked rather than whether they will be convicted of a new offense."

See LaFave, *supra* §1.6(g) at 180.[21]

Petitioner and its *amici* argue that extending the exclusionary rule to revocation hearings will be useless. Petitioner states that "parole agents under the circumstances of this case are not seeking to convict the parolee of new criminal offenses; therefore, application of the exclusionary rule in this situation would have no deterrent effect whatsoever on police behavior or a criminal prosecution." Brief for Petitioner at 29. The Solicitor General asserts that agents are unlikely to be subjected to the same institutional pressures that confront police officers. Brief for the United States at 16. Each of these claims is badly flawed.

[21] *See also* Mark E. Opalisky, "The Applicability of the Exclusionary Rule to Probation Revocation Proceedings," 17 Mem. St. U. L.Rev. 555, 568 (1987)("when an officer illegally seizes evidence knowing it cannot be introduced in a criminal trial but believing it will nevertheless be accepted in a probation revocation proceeding, then the need to deter is conspicuously present and the rule should apply").

Petitioner's argument, of course, distorts the ruling below. Applying the exclusionary rule here is not meant to deter police officers; rather, the targets of deterrence are parole agents. Moreover, although petitioner does not discuss the matter, there are good reasons to believe that exclusion will deter future unlawful acts by parole agents. Agents are not only aware of the existence of search and seizure law, they are also cognizant of the rule's impact on revocation hearings and criminal trials.[22]

Similarly, the Solicitor General's assertion is not supported by empirical or other evidence. In theory, parole agents utilize various models of supervision depending on the needs of the parolee, the agent's duties, and the desires

---

[22] *See, e.g.*, Parole Commission, Department of Justice, "Paroling, Recommitting and Supervising Federal Prisoners: Searches of Federal Parolees by U.S. Probation Officers," 28 C.F.R. Part 2; 56 Fed. Reg. 30870 (July 8, 1991)(Parole Commission expands search authority "in response to the concerns of U.S. Probation Officers that their supervision of certain parolees cannot be effective without more expanded search and seizure authority than the Commission has traditionally permitted"); Judd D. Kutcher, "Looking at the Law," 46 Federal Probation 55, 56 (Sept. 1982)(describing the probation officer's role in search and seizure of probationers, and noting that compliance with legal rules "should help ensure that the results of a legitimate probate [sic] officer search are admissible for revocation purposes"); Rolando V. del Carmen, "Potential Liabilities of Probation and Parole Officers" 126 (National Institute of Corrections, Aug. 1985)(reporting that "survey of field officers revealed significant concern with parole and probation conditions requiring released offenders to waive fourth amendment protections concerning searches and seizures, and with searches in the absence of waiver conditions"); *id.* at 146-47 (discussing the exclusionary rule and its relevance to parole agents: "field officers may become, in the course of their duties, the first government agents with the opportunity to secure evidence of a crime. By acting properly at that point, they can contribute to a successful law enforcement effort. Conversely, misconduct could ultimately cause an objectively guilty person to escape proper sanction").

of the community. The most prevalent model used by agents,however, is "the law enforcement model."[23] Studies and press reports of supervised release programs show that many locales embrace the law enforcement model.[24] Moreover, the claim that parole agents are free from the pressures that affect police officers is undermined by the fact that federal probation officers have themselves sought and obtained additional search and seizure authority for supervising certain federal parolees. *See* n.22, *supra*. In sum, empirical and other evidence confirms that parole agents encounter vast incentives to evade constitutional rules. In light of these incentives, the exclusionary rule is an essential remedy to encourage parole agents to observe the Constitution.

---

[23] *See* Cohen & Gobert, *supra*, §8.01 at 374 ("Observers have identified three [models of supervision]: (1) the law enforcement model, where officers see their job as protecting the community through close control of the probationer or parolee; (2) the therapeutic model, where the officers focus on improving the welfare of the probationer or parolee; and (3) the synthetic model, where the officers attempt to blend the control and treatment functions. Although most agencies espouse the synthetic model, they often in practice lean more toward a control model").

[24] *See, e.g.*, Joan Petersilia, "Probation and Felony Offenders," 49 Fed. Probation 4 (June 1985)(describing close supervision regime, which require probationers to follow strict curfew rules, maintain employment, receive professional counseling, provide community service, submit to random drug testing and make restitution); Matthew Purdy, "Visits and Vigilance: Sex Offenders Shadowed by Parole Officers," N.Y. Times, June 8, 1997 (reporting extensive surveillance by parole officer of parolees; officer describes his job as "neither to exact retribution nor to offer compassion, but to keep [parolees] from committing the same crime again"); Steve Elliott, "Probation Officer Turns Up HEAT," Fresno Bee, Nov. 27, 1997 (describing joint patrols by parole officers and police; "[w]hat a probation officer brings to the HEAT team is the legal ability to search without a warrant those already on probation").

CONCLUSION

For the reasons stated above, the judgment of the Pennsylvania Supreme Court should be affirmed.

Respectfully submitted,

Tracey Maclin
(*Counsel of Record*)
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4688

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Stefan Presser
ACLU of Pennsylvania Foundation
125 South Ninth Street
Philadelphia, Pennsylvania 19107
(215) 592-1513

Of Counsel:

Lisa B. Kemler
108 North Alfred Street
Post Office Box 20900
Alexandria, Virginia 22313
(703) 684-8000

Dated: January 30, 1998